IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1778

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STANDARD OIL COMPANY OF CALIFORNIA;
AMERADA HESS CORPORATION;
GULF OIL CORPORATION;
MARATHON OIL COMPANY;
PHILLIPS PETROLEUM COMPANY;
and STANDARD OIL COMPANY (OHIO),

Petitioners,

-v-

STATE OF FLORIDA EX REL. SHEVIN,

Respondent.

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# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## OPINIONS BELOW

The Petition for Certiorari accurately reflects those opinions and orders referred to therein. In addition, a copy of the Order of the Honorable Lewis J. Powell, Jr., denying the Application for Stay of Mandate, which was not included in Petitioners' appendix, is appended hereto. (App., p. A-1)

## RESTATEMENT OF QUESTION PRESENTED

After an exhaustive review of the federal question of the standing of the Florida Attorney General to institute an antitrust action pursuant to federal law in federal court on behalf of the departments, agencies and political subdivisions of the State, the Court of Appeals determined that the existence of such authority was "simply not an extremely close question" State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 at 274 (5th Cir., 1976) and, in deciding that the Attorney General clearly did have such standing, also determined that certification of the issue to the Florida Supreme Court was unnecessary and improvident.

The issue raised is whether the Court of Appeals abused its discretion regarding the use of the certification process in determining that certification to the Florida Supreme Court was unnecessary in the light of the unambiguous state decisions, the significant delay which would result from certification and the determination that there was no apparent conflict between or within the branches of Florida government.

## STATEMENT OF THE CASE

In July of 1973, the Florida Attorney General instituted an antitrust action in the federal district court for the Northern District of Florida. The jurisdiction in the action was founded solely on 15 U.S.C., §§15, 26 (1970), the federal antitrust laws, and the diversity jurisdiction of



the federal courts was not invoked. The suit was against seventeen major oil companies alleging a scheme of anticompetitive activities in the production, transportation, refining, and marketing of petroleum; seeking, inter alia, to recover damages allegedly suffered by the State of Florida as a consumer, which damages accrued to the constituent units of the State--its agencies, departments and subdivisions.

Among the preliminary issues raised by the defendants in that suit was the right of the Florida Attorney General to institute an antitrust action in the federal court pursuant to a federal law without explicit authority from those departments, agencies and political subdivisions.

After the federal district court dismissed the action for lack of such authority, the Attorney General appealed to the Fifth Circuit Court of Appeals and that Court, after exhaustive analysis, upheld the Attorney General's right to institute the action in federal court pursuant to a federal statute. State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir., 1976) In the Court of Appeals, the Petitioners here argued unsuccessfully that the issue was a delicate and difficult one of state law which should be certified to the Florida Supreme Court for its definitive decision. However, in determining that the Attorney General has the power to prosecute the action, Judge Thornberry noted (Id. at p. 272 ) that "actions by attorneys general on behalf of states under the federal antitrust laws are by no means a novel phenomenon . . . ."

and that the question posed by that litigation "is a pure federal question . . . in which state law happens to be relevant in determining the issue of standing." (Id. at p. 275 ) The ultimate consideration relates to the vindication of a right created by federal statute to protect United States citizens (who, in the context of this case, are coincidentally citizens of the State of Florida) by the elected public official best able to protect that federal right.

The Court of Appeals, in holding that the Attorney General clearly had standing to bring the federal court action without an express grant of authority and, in denying the request for certification, concluded:

> We reach this conclusion, after extensive study and able briefing by all parties, with considerable confidence. In our view, this simply is not an extremely close question. State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 at 274 (5th Cir., 1976)

The Court of Appeals further closely examined the comity issue raised by the oil companies that that case involved "the fundamental structure of the state of Florida" and that it is a "sensitive area of state law." The Court noted the lack of objection or intervention by other state instrumentalities in the period of over two years since the institution of the suit and the primarily federal nature of the question, i.e., the standing to institute



suit in a federal court pursuant to a federal statute, and decided that the consideration of federal-state comity was "somewhat less persuasive still." (Id. at p. 275)[1] Finally, the Court of Appeals considered the further delay of the action as weighed against the necessity of a State Court statement on that already relatively clear issue before the Court in deciding against certification. (Id. at p. 275)

There followed a series of unsuccessful attempts to have that decision reconsidered, modified, or overturned by the courts. The matter, having been unsuccessfully argued on the merits before the Fifth Circuit Court

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[1]Subsequent events in Florida provide an even greater reason as to why it would unnecessarily violate the principles of comity for the court to grant certiorari. The legislature passed CS/SB 738 that expressly authorized the Attorney General to bring suit under the federal antitrust laws. (App., pp. A-2 - A-7)

The antitrust authorization was included in a bill that dealt with other civil litigation. The Governor vetoed the bill on entirely independent grounds. See veto message filed June 24, 1976, for CS/SB 738, and supporting memorandum, which states "the veto of CS/SB 738 is not directed at §3 relating to antitrust litigation. Chapters 542 and 16, F.S., Art. IV, §4, Fla. Const. (1968) and the common law brought forward by Ch. 2, F.S., presently provide the same authority." (App., p. A-9 - A-12) Clearly, the Court should not interfere with the Attorney General's power in the face of the positive approval of both the legislative and executive branches of the state government.

of Appeals, was then unsuccessfully petitioned for rehearing en banc by the entire federal circuit appellate court, which petition was summarily denied. There was then an unsuccessful attempt to have the Court of Appeals stay its Mandate pending filing of a Writ of Certiorari with this Court, which attempt was also summarily denied. Further, a petition for a stay pending the filing of a Writ of Certiorari was also sought from this Court directly, which petition was likewise denied. Finally, an effort was made to have the Fifth Circuit Court of Appeals modify its Mandate to permit the unsuccessful appellees to seek a stay of the proceedings in the federal district court, to which the matter returned, in order to file a declaratory judgment action relating to the same issues in the Florida courts. This effort was likewise summarily denied. Nevertheless, such an action for a declaratory judgment was then instituted in the Florida Court and is presently pending on a Motion to Dismiss filed by the Attorney General.[2] Finally, this Petition for a Writ of Certiorari was submitted to this Court.

ARGUMENT

THE CRITERIA FOR USE OF THE CERTIFICATION PROCEDURE HAVING BEEN SET OUT BY THIS COURT AND HAVING BEEN PROPERLY APPLIED BY THE COURT OF APPEALS IN THIS CASE, THERE IS NO ISSUE WHICH MEETS THE STANDARDS FOR THE GRANTING OF A WRIT OF CERTIORARI.

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[2]Mobil Oil Corp., et al. v. Robert L. Shevin, Attorney General, Second Judicial Circuit, No. 76-950.



The basic legal theory put forth by the Petitioners in seeking certiorari is that the proper standards for use of the certification procedure have not been sufficiently defined by the leading cases on this subject.[3]

In seeking certiorari, the Petitioners have the burden of establishing special and important reasons which would justify the Court's granting certiorari. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955)

The Court "does not sit to satisfy a scholarly interest in [an] issue. Nor does it sit for the benefit of particular parties." Rice v. Sioux City Memorial Park Cemetery, supra, at p. 74. The test therefore is not the importance of the issue to the particular litigation, but rather the importance of the decision to the development of the legal system. Thus, in Layne and Bowler Corp. v.

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[3]The sole apparent basis which Petitioners seek to apply to their Petition for Certiorari appears to be that set out in Rule 19(1)(b) (Rules of Supreme Court), which indicates that among the reasons for determining to grant certiorari, the following will be considered:

"(b) Where a court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this court; . . . . ."

No other criteria of Rule 19 appears to apply to the reasons for granting the Writ set out by Petitioners (Petition for Certiorari, p. 5)

Western Well Works, Inc., 261 U.S. 387 (1922), this Court dismissed a Writ of Certiorari as improvidently granted after deciding that there was no conflict between the circuits. Justice Taft rejected the contention that since arguments had been heard the Court should decide the case:

> It is manifest from the review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th, and 20th claims, that they were really in harmony, and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head. 261 U.S. 387, 392-393 (e.s.)



The Petitioners must therefore show some genuine conflict among the circuit courts[4] or some principle which needs to be decided of importance beyond the litigation at hand.

However, a careful reading of the Petition for Certiorari makes it clear that the real argument of Petitioners is that the size and scope of the suit at hand justifies the granting of certiorari.[5]

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[4]Petitioners do not suggest in their Reasons for Granting the Writ that a conflict exists between the circuits in the setting of criteria for use of certification, though there appears to be some suggestion in the arguments that a difference of approach to application of the criteria exists. (Petition for Certiorari, p. 8, fn. 4) Any claim of inconsistency of criteria for determining the use of the certification process is without merit. (See discussion, infra pp. 14-17).

[5]"This is no routine tort or contract action. It is a massive Federal antitrust action that will consume millions of dollars and as much as a decade of the time of the congested Federal courts and of the parties." (Petition for Certiorari, p. 9) And at another point, Petitioners assert that the Court of Appeals "erroneously failed to recognize the immense savings in judicial resources that certification could achieve in this case, with only minor inconcenience to the parties." (Petition for Certiorari, p. 7) It might be noted that there are numerous other suits, including suits by Kansas, Connecticut, California and the City of Long Beach on basically

This, however, is not a proper consideration for the granting of certiorari.[6]

The Petitioners frame the first reason for granting certiorari as follows: "This Court should provide additional guidance for the proper use of the rapidly emerging certification procedure." (Petition for Certiorari, p. 5) The three additional "reasons" for granting certiorari, set out in Points II, III and IV of the Petition for Certiorari, are merely sub-issues of the first: the need to clarify the weight to be given possible delay (Petition for Certiorari, p. 8), the need to clarify the degree of uncertainty of the state law that would justify certification (Petition for Certiorari, p. 12), and finally the need to clarify when issues of important state policy require certification. (Petition for Certiorari, p. 15) Actually the last three reasons when carefully examined merely recognize the present criteria and assert that the Fifth Circuit incorrectly applied those existent standards for certification, i.e., delay, difficulty

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the same issues, and that they will proceed on basically the same massive issues of fact and law as this action, even if this case were ultimately dismissed for lack of standing.

[6]It must be emphasized that the Court does not sit for particular litigants, regardless of how important those litigants may feel their particular litigation to be. See Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).



of ascertaining state law, on comity considerations, rather than asserting that the standards that were used were incorrect.

In point of fact, the standards set out for the use of the certification procedure are quite well-defined, as are in the limitations on the scope of judicial review of the application of those standards to a particular case.

An examination of the standards that the Fifth Circuit adopted in State of Florida ex rel. Shevin v. Exxon Corp., supra, indicates that the Court in fact considered three factors as controlling: (1) the closeness of the question and the existence of sufficient sources of state law; (2) principles of comity required by the nature of the issues; and (3) practical considerations such as the degree of delay that certification would cause:

> In determining whether to exercise our discretion in favor of certifications, we consider many factors. The most important are the closeness of the question and the existence of sufficient sources of state law--statutes, judicial decisions, attorney general's opinions--to allow a principled rather than conjectural conclusion. But also to be considered is the degree to which considerations of comity are relevant in light of the particular issue and case to be decided. And we must also take into account practical limitations of the certification

process; significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. 526 F.2d 266 at 274-275.[7]

It must be remembered that two distinct issues are involved. The first is whether or not the Fifth Circuit used the proper standards. The second is whether or not these standards were correctly applied. The Petitioners address the issue of standards in their first reason why certiorari should be granted. Although couched in the language of clarifying standards, the Petitioners in Points II, III, and IV, as noted above, merely assert that the standards were misapplied in this particular case. If this is the proper characterization of the Petitioners' last three arguments, then they are not relevant in establishing an important public need to clarify standards. Instead they merely go to the questions of whether or not their particular case was wrongly decided. It is axiomatic that certiorari is not granted merely because of the interest of the particular litigants. See Rice v. Sioux City Memorial Park Cemetery, supra.

The standards for use of the certification procedure are well-established and, as set out above, were carefully examined and weighed by the Court in this case.

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[7]Also see 526 F.2d 266 where the Court recognized the likelihood of recurrence of a particular issue as a factor to be considered.



The considerations applied by the Fifth Circuit and set out above are the same considerations enunciated by this Court in discussing certification. In Kaiser Shell Corp. v. W. S. Ranch Co., 391 U.S. 593 (1969), this Court asserted:

> The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource. 391 U.S. 593, 594 (1969)

The court in Kaiser uses a multitude of factors including comity, uncertainty of the state law (novelty), possibility of delay, and probability that the issue will reoccur. The Fifth Circuit used the exact same criteria. See Exxon, supra, at 274, 275 and 266. Kaiser supports the respondents contention that a consistent

standard has been used on the certification issue.[8]

Likewise, the criteria considered are consistent, both in certification and abstention cases, except for the factor of some possible greater facility in obtaining a state court review by the certification process.[9]

In reviewing the certification--abstention question, Petitioners' assertion that a comparison of Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959) with Louisiana P and L Co. v. City of Thibodaux, 360 U.S. 25 (1959) will demonstrate a "vacillating and often conflicting line of decisions," will not withstand analysis. In Allegheny County v. Frank Mashuda Co., 360 U.S. 185 (1959), 79 S.Ct. 1070, 3 L.Ed.2d 1058, the Supreme Court affirmed the judgment of the Court of Appeals holding that the district court improperly invoked the doctrine of abstention. The Plaintiffs in Allegheny County were property owners in Pennsylvania who challenged the appropriation of their

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[8]Kaiser clearly does not stand for the proposition that the considerations of comity by themselves require that an issue be certified as is argued mistakenly by Petitioners.

[9]It should be made clear, however, that the certification process is by no means "fast", and that it involves significant delay in the judicial process as compared to a decision by the federal court without certification. As the Fifth Circuit pointed out, the experience with



property as an illegal taking for private use. The district court recognized that it had diversity jurisdiction, but invoked the doctrine of abstention. The Supreme Court upheld the Court of Appeals reversal. The Court reasoned that it was "perfectly clear under Pennsylvania law that the respondents would have challenged the validity of the taking, on the ground that it was not for a public purpose. (360 U.S. 185 at 190) The court concluded that "the state law that the district court was asked to apply is clear and certain." (360 U.S. 185 at 190) Since only a factual determination was required, there would be no problem with the possibility of the federal court misapplying state law. The court also stated that merely because the case dealt with the state's eminent domain power, there was no basis to conclude that abstention is justified on the grounds of avoiding the hazard of friction in federal-state relations. Finally, the court emphasized that abstention would accomplish "additional delay and expense." These standards that were the basis of the court's decision in Allegheny County are precisely the standards adopted by the Fifth Circuit in Exxon, supra. This

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the certification process in the Fifth Circuit indicates an average delay exceeding one year--and sometimes much more. See e.g., Allen v. Estate of Carmen, 446 F.2d 1276 (5th Cir., 1971), on receipt of answers to certification, 486 F.2d 490 (5th Cir., 1973) (28 months); Hopkins v. Lockheed Aircraft Corp., 358 F.2d 347 (5th Cir., 1966), on receipt of answers to certification, 394 F.2d 656 (5th Cir., 1968) (26 months).

suggests that the standards have in fact been consistently applied.

Petitioners' assertion that Louisiana P & L Co. v. City of Thibodaux, supra, is inconsistent with Allegheny County will not withstand analysis. In Louisiana P & L Co., the district court was confronted with an extremely close question of Louisiana law. Louisiana P & L Co. merely stands for the proposition that a district court judge does not abuse his discretion "to solve his conscientious perplexity by directing utilization of legal resources of Louisiana" (360 U.S. 25 at 30) The concurring opinion of Justice Stewart is even more explicit. Justice Stewart stated that "this case is totally unlike Allegheny County v. Frank Mashuda Co., decided today except for the coincidence that both cases involved eminent domain proceedings." (360 U.S. 25 at 31) Justice Stewart went on the emphasize the fact that the controlling law was clear in Allegheny County and all that the district court was required to do in that case was to decide a factual controversy.

The Petitioners erroneously assert that the need for clarification of the standards for certification "is illustrated by the sharp decisions in such cases as United States v. Buras (5th Cir., 1972), 475 F.2d 1370, 1371, cert. denied (1973), and Schein v. Chasen, (2nd Cir., 1973), 478 F.2d 817, 819, 825, vacated 1974, 416 U.S. 386" (Petition for Certiorari, p. 7) At the first it should be noted that the Petitioners do not assert a conflict between the circuits but rather a conflict within the panel of judges making the decisions in those cases.



In Buras there is only a per curiam denial for rehearing with no discussion. Judge Brown dissented on the grounds that the Louisiana certification statute should have been used. Similarly, the dissent in Schein urged that the Florida certification statute be utilized. Yet there is nothing to indicate in either case that the Allegheny County standard was not adhered to. In all likelihood there was simply a disagreement on the application of that standard to the particular factual situation. To conclude from the fact that certain judges dissent in the application of a rule is sufficiently adequate grounds to grant certiorari is patently absurd.

It is clear, therefore, that there is little evidence of a conflict in the standards that are used in deciding whether to certify a question. The Fifth Circuit in State of Florida ex rel. Shevin v. Exxon Corp., supra, rigorously applied the same standards that were enunciated in Kaiser and Allegheny County.

Finally, in reviewing this matter the caution expressed by this Court in evidencing the discretionary activity of the Circuit Court in their use or non-use of the certification process should be kept in mind. The Court has clearly recognized that any rule which lacked flexibility and adequate discretion in the lower court should be avoided. In Lehman Brothers v. Schein, 416 U.S. 386 at 390-391 (1974), this Court asserted that "we do not suggest where there is doubt as to local law and where the certification procedure is available, resort to it is

obligatory."[10] Furthermore, Justice Rehnquist, in his concurring opinion, reviewed the discretionary nature of the procedure:

> While certification may engender less delay and create fewer additional expenses for litigants than would abstention, it entails more delay and expense than would an ordinary decision of the state question on the merits by the federal court. See Clay v. Sun Insurance Office, 363 U.S. 207, 226-227, 4 L.Ed.2d 1170, 80 S.Ct. 1222 (1960) (dissenting opinion). The Supreme Court of Florida has promulgated an appellate rule, Fla. Appellate Rule 4.61 (1967), which provides that upon certification by a federal court to that court, the parties shall file briefs there according to a specified briefing schedule, that oral argument may be granted upon application, and that the parties shall pay the costs of the certification. Thus while the certification procedure is more likely to produce the correct determination of state law, additional time and money are required to achieve such a determination.
>
> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used. 416 U.S. 386, 394-395 (1974)

[10] While Lehman Brothers is a diversity case, the Fifth Circuit correctly indicated that the basis for certification is even less in this case, where the issue involves standing to sue in federal court pursuant to a federal statute and the local law is only incidental to the determination of the purely federal question. See 526 F.2d at 275 (5th Cir., 1976)



In summary, Petitioners' attempts to frame their reasons for granting certiorari on the basis of the need to clarify the standards for certification are unconvincing. It appears that the procedure itself is only rarely used and when it has been used, consistent standards have been applied. When the Petitioners' arguments are closely examined, they are no more than an assertion that the question in the lower court was close enough to require certification because of the size of that particular lawsuit. In short, Petitioners argue that the existing standards were misapplied by the Fifth Circuit. Such an argument is clearly not a sufficient basis for the granting of certiorari.

## CONCLUSION

For the reasons stated, the Petition

for a Writ of Certiorari should be denied.

Respectfully submitted,

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(APPENDIX FOLLOWS)



A P P E N D I X

April 19, 1976

Noble McCartney, Esq.
Suite 1100
1660 L St., N.W.
Washington, D.C. 20036

Re: Standard Oil Company of California v. Florida ex rel. Robert L. Shevin
A-862 [USCA 5 #74-3309]

Dear Sir:

The Court today entered the following order in the above-entitled case:

The application for a stay of the mandate of The United States Court of Appeals for the Fifth Circuit (No. 74-3309) pending the timely filing and disposition of a petition for writ of certiorari, presented to Mr. Justice Powell and by him referred to the Court, is denied.

Very truly yours,

Michael Rodak, Jr., Clerk

s/ Helen Taylor

Helen Taylor (Mrs.)
Assistant Clerk

Hon. Robert L. Shevin
Attorney General of Florida
Capitol
Tallahassee, Fla. 32304

Att'n Sydney H. McKenzie, III
Chief Trial Counsel

A bill to be entitled

An act relating to legal services for state agencies; amending s. 16.01, Florida Statutes; creating s. 16.055, Florida Statutes; specifying persons to whom the Attorney General may give official opinions; creating s. 16.55, Florida Statutes; authorizing the Attorney General to initiate, maintain, prosecute lawsuits to enforce antitrust laws; creating s. 16.57, Florida Statutes; authorizing the Attorney General to initiate civil litigation, with the approval of the Governor and Cabinet, when no state agency is vested with the authority to enforce such right; providing exceptions and authorizing the Attorney General to file under certain statutes; providing procedure for Attorney General to initiate civil litigation when a state agency is vested with authority; amending s. 20.11, Florida Statutes; providing that the Department of Legal Affairs may provide legal services to a state agency only upon written request of the head of such agency; creating s. 542.13, Florida Statutes; providing a trust fund for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws; providing for the allocation of recovered funds; repealing s. 16.101, Florida Statutes, which



provides that the Attorney General shall be the reporter for the Supreme Court; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 16.01, Florida Statutes, is amended to read:

16.01 Residence, office and duties of attorney general.--The Attorney General shall reside at the seat of government, and shall keep his office in a room in the capitol; he shall perform the duties prescribed by the constitution of this state, and also perform such other duties appropriate to his office, as may from time to time be required of him by law, or by resolution of the legislature; ~~he shall, on the written requisition of the Governor, Secretary of State, Treasurer, or Comptroller, give his official opinion and legal advice in writing on any matter touching their official duties;~~ he shall appear in and attend to in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court and district courts of appeal of this state; he shall appear in and attend to such suits or prosecutions in any other of the courts of this state, or in any courts of any other state, or of the United States; he shall have and perform all powers and duties incident or usual to such office, and he shall make and keep in his office a record of all his official acts and proceedings, containing copies of all his official opinions, reports and correspondence, and also keep and preserve in his office all official letters and communications to him, and

cause a registry and index thereof to be made and kept, all of which official papers and records shall be subject to the inspection of the Governor of the state, and to the disposition of the Legislature by act or resolution thereof.

Section 2. Section 16.055, Florida Statutes, is created to read:

16.055 Opinions of the Attorney General.--

(1) The Attorney General shall, upon the written request of the Governor, Lieutenant Governor, Secretary of State, Treasurer, Comptroller, Commissioner of Agriculture, Commissioner of Education, any member of the Florida delegation to the United States Congress, any member of the Florida Senate or the Florida House of Representatives, a State Attorney, a sheriff, or any other constitutional county officer, the Auditor General, or the head of any state department, render his official opinion in writing on any matter affecting the official responsibility, authority, powers, or duties of such officer. On matters of statewide interest affecting the respective responsibility, authority, powers, or duties of any of the following persons, the Attorney General shall, upon written request, render his official opinion to a Clerk of Circuit Court, a property appraiser, or a police chief. Official opinions shall be given only to those persons specified in this subsection.

(2) All requests for official opinions of the Attorney General shall be in writing and shall:

(a) Set forth all relevant facts regarding the matter about which inquiry is made;

(b) Contain a statement as to the manner in which the matter inquired about affects the requesting party;



(c) Contain a citation to, or be accompanied by copies of any known relevant applicable legal authorities;

(d) Contain a statement showing that the matter inquired about touches upon the powers and duties of the person making the inquiry; and

(e) Contain a memorandum of law stating the position of the legal counsel representing the requesting party if such person is represented by legal counsel.

(3) Any interested parties may file with the Attorney General a memorandum of law regarding a request for an Attorney General's opinion.

Section 3. Section 16.55, Florida Statutes, is created to read:

16.55 Antitrust litigation.--The Attorney General is authorized to initiate, maintain, or prosecute lawsuits in the courts of this state, any other state, or in the federal courts to enforce the antitrust laws of the State of Florida and of the United States on behalf of the State of Florida or any unit of government in this state.

Section 4. Section 16.57, Florida Statutes, is created to read:

16.57 Authority of the Attorney General to initiate civil litigation.--When any statutory, common law, or constitutional provision provides a public right which may be enforced by the filing of a civil lawsuit and no state agency has been vested with the authority to enforce such right, the Attorney General, with the approval of the Governor and Cabinet, is authorized to commence, prosecute, and settle appropriate civil litigation, on behalf of the State of Florida or on behalf of the people of this state, to enforce such statutory, common law, or constitutional provisions;

provided that the approval shall not be necessary for the Attorney General to enforce any provision contained in chapters 16, 60, 80, 83, 86, 501, and 542, to the extent provided therein, or when the Attorney General is otherwise specifically authorized by law. If a state agency is vested with civil litigation enforcement authority, the Attorney General shall obtain the written concurrence of the agency vested with such enforcement authority prior to commencing any civil litigation. When an agency having enforcement authority refuses to approve the commencement of civil litigation by the Attorney General, the Attorney General shall obtain the approval of the Governor and Cabinet prior to commencing such civil litigation.

Section 5. Subsection (3) of section 20.11, Florida Statutes, is amended to read:

20.11 Department of Legal Affairs.--There is created a Department of Legal Affairs.

(3) The Department of Legal Affairs shall provide ~~be responsible for providing all~~ legal services to an agency of state government only upon written request of the head of the agency ~~required by any department unless otherwise provided by law~~, provided however, the Attorney General may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present. Each board, however designated, of which the Attorney General is a member may retain legal services in lieu of those provided by the Attorney General and the Department of Legal Affairs.

Section 6. Section 542.13, Florida Statutes, is created to read:

542.13 Antitrust Revolving Trust Fund.--



(1) There is hereby created in the State Treasury a trust fund named the Antitrust Revolving Trust Fund from which the Legislature may appropriate funds for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws by the Attorney General.

(2) Six percent of all money recovered by the Attorney General in any civil action for violation of federal or state antitrust laws on behalf of the state or its agencies shall be deposited in the fund. In the case of recoveries made on behalf of any unit of government in this state, 10 percent of the recovery, or attorney's fees and actual expenses incurred by the Attorney General, whichever is greater, shall be deposited in the fund. The remainder of the money recovered shall be deposited in the General Revenue Fund, or in the case of a unit of government transferred to the appropriate fund of such governmental unit. "Money recovered" shall include damages, penalties, attorney's fees, costs, or any other monetary payment made by any defendant by reason of any decree or settlement in an antitrust action prosecuted by the Attorney General.

Section 7. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared severable.

Section 8. Section 16.101, Florida Statutes, is hereby repealed.

Section 9. This act shall take effect upon becoming a law.

FILED
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STATE OF FLORIDA

OFFICE OF GOVERNOR REUBIN O'D. ASKEW

BRUCE A. SMATHERS
SECRETARY OF STATE

June 24, 1976

Honorable Bruce Smathers
Secretary of State
The Capitol
Tallahassee, Florida 32304

Dear Mr. Secretary:

By the authority vested in me as Governor of Florida, under the provisions of Article III, Section 8, of the Constitution of the State of Florida, I hereby withhold my approval of and transmit to you with my objections Senate Bill 738, enacted by the Fourth Legislature of Florida under the Florida Constitution, 1968 Revision, during the Regular Session of 1976, and entitled:

> "An act relating to legal services for state agencies; amending s. 16.01, Florida Statutes; creating s. 16.055, Florida Statutes; specifying persons to whom the Attorney General may give official opinions; creating s. 16.55, Florida Statutes; authorizing the Attorney General to initiate, maintain, prosecute lawsuits to enforce antitrust laws; creating s. 16.57, Florida Statutes; authorizing the Attorney General to initiate civil litigation, with the approval of the Governor and Cabinet, when no state agency is vested with the authority to enforce such right; providing exceptions and authorizing the Attorney General to file under certain statutes; providing procedure for the Attorney General to initiate civil litigation when a state agency is vested with authority; amending s. 20.11, Florida Statutes; providing that the Department of Legal Affairs may provide legal services to a state agency only upon written request of the head of such agency; creating s. 542.13, Florida Statutes; providing a trust fund for the purpose of funding investigation, prosecution, and enforcement of the provisions of state or federal antitrust laws;





> providing for the allocation of recovered funds; repealing s. 16.101, Florida Statutes, which provides that the Attorney General shall be the reporter for the Supreme Court; providing an effective date."

Committee Substitute for Senate Bill 738 amends chapter 16, Florida Statutes, relating to the duties of the Attorney General. The legislation clarifies the law regarding issuance of legal opinions by the Attorney General. It also establishes a special trust fund for investigation, prosecution and enforcement of state and federal antitrust laws. These are needed improvements in present law which I support.

However, the legislation also contains provisions relating to civil litigation enforcement authority which could be interpreted to result in a fundamental change in executive responsibility. The bill provides that when a state agency is vested with civil litigation enforcement authority, the Attorney General shall obtain the written concurrence of the agency vested with such authority prior to commencing any civil litigation. It further provides that when an agency having enforcement authority refuses to approve the commencement of civil litigation, the Attorney General shall obtain the approval of the Governor and Cabinet prior to commencing such civil litigation.

The phrase "approval of the Governor and Cabinet" presents a problem of interpretation. The bill does not specify whether a simple majority vote of the Governor and Cabinet collectively is required. The phrase could be construed to require approval by the Governor plus a majority of the six-member Cabinet. Although under present law certain decisions relating to the Governor and Cabinet require affirmative action by the Governor, such as selection of the executive director of the Department of Criminal Law Enforcement or decisions of the Administration Commission, there is presently no decision requiring affirmative action by the Governor and four members of the Cabinet. Therefore, the most likely interpretation is that a simple majority vote is required.

The importance of enforcement through civil litigation in the administration or executive responsibilities is obvious.

Senate Bill 738 would appear to permit final enforcement decisions to be made by four members of the Cabinet without the concurrence of the Governor in all areas of executive branch responsibility. This would include areas such as health, transportation, environmental regulation, budget and personnel administration where the Governor presently is charged with sole responsibility. I have discussed the problem of legal interpretation with the Attorney General and he concurs in this conclusion. Whether or not this was the legislative intent, it would constitute a fundamental change contrary to the public interest.

An additional very serious problem with Senate Bill 738 is that it restricts the authority of the Attorney General to initiate civil litigation to protect the public's right to know. The bill would require approval by the Governor and Cabinet for enforcement through civil litigation of the public record's law, Chapter 119, Florida Statutes. I believe this area is so vital to the public interest that an Attorney General should not be encumbered in any way to institute such proceedings.

For the above reasons, I am withholding my approval of Senate Bill 738, Regular Session of the Legislature, commencing on April 6, 1976, and do hereby veto the same.

Sincerely,

Governor

ROA/mdk



MEMORANDUM

RE: CS/SB 738

This bill alters and restricts the powers of the Attorney General and creates an antitrust revolving trust fund. Section 4 creates §16.57, F.S., which provides for three categories of civil lawsuits to be filed by the Attorney General. The first category unnecessarily, and possibly unconstitutional provisions when no agency has such authority. In particular, the Attorney General would be deprived of the authority to enforce, without Governor and Cabinet approval, the Public Records and Sunshine laws. Experience has shown that without this independent and vigorous authority of the Attorney General, Florida's open government laws would not be effective. The second category authorizes the Attorney General to independently file under the enumerated chapters.

The third category requires the Attorney General to receive concurrence, prior to filing the lawsuit, from the agency vested with authority to enforce a statutory or constitutional provision. If the agency refuses to concur, the Attorney General may override that decision by seeking approval from the Governor and Cabinet.

This provision makes no distinction between agencies placed under the direct control and administration of the Governor and of the Governor and Cabinet. It is the apparent, although unstated, legislative intent to have any four individuals of the Governor and Cabinet vote on decisions made by agencies under the Governor's direct

administration. This failure to recognize the distinction between gubernatorial agencies and governor and cabinet agencies raises a conflict with Art. IV, §6, Fla. Const. (1968), and creates a constitutional defect. This constitutional restraint mandates that the administration of all departments be placed, in pertinent part, under either the Governor or the Governor and Cabinet. The constitution expressly prohibits the Legislature from granting the Governor and Governor and Cabinet concurrent jurisdiction over agencies under their respective power, control, and administration.

The veto of CB/SB 738 is not directed at §3 relating to antitrust litigation. Chapters 542, and 16, F.S., Art. IV, §4, Fla. Const. (1968) and the common law brought forward by Ch. 2, F.S., presently provide the same authority.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foreoging BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI and APPENDIX thereto, has been furnished, by U.S. Mail, to the following:

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DATED this 6th day of July,
1976.

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